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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 189

THE NORTHERN TRUST COMPANY, JAMES A. RUSSELL, MAURICE E. GRAVES, AND E. LEROY HALL,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioners, The Northern Trust Company, James A. Russell, Maurice E. Graves, and E. LeRoy Hall, respectfully pray for a writ of certiorari to review the judgment herein of the United States Circuit Court of Appeals for the Seventh Circuit (R. 90-91), which judgment affirmed an order of the District Court for the Northern District of Illinois, Eastern Division (R. 61-64) enforcing certain subpoenas hereinafter referred to.

## Opinions Below.

The opinion of the court below (R. 80-90) is reported in 148 Fed. (2d) 24.

The opinion of the District Court (R. 54-61) is reported in 56 Fed. Supp. 335.

## Jurisdiction.

The judgment of the court below was entered on February 28, 1945. (R. 90-91.) Petition for rehearing duly filed (R. 91) was denied on April 5, 1945. (R. 111.)

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended (Sec. 347(a), Ch. 9, Title 28, United States Code).

## STATEMENT OF MATTER INVOLVED.

On March 14, 1944, Respondent filed its verified application before the District Court under Section 11(2) of the National Labor Relations Act for an order requiring Petitioner, The Northern Trust Company, to comply with and obey a subpoena *duces tecum*, and Petitioners Russell, Graves and Hall to comply with and obey subpoenas *ad testificandum*, which subpoenas had been issued by a member of Respondent Board. (R. 2.)

The application of the Board alleged that on October 19, 1943, the Protective Service Employees Union of Chicago, Local 240, Building Service Employees International Union (A.F.L.) filed its petition with the Board charging "that a question concerning representation affecting commerce had arisen among the employees" of the Bank at its place of business in Chicago. (App. Item 5; R. 3.) A copy of said petition was attached to the application as Exhibit 2. The petition of the Union alleged that the appropriate bargaining unit was "all employees working as armed guards, except supervisors and all other employees" (Pet. Item 4; R. 10), and that the number of employees in such unit was thirteen (Pet. Item 5; R. 10), and that a question had arisen concerning the representation of the employees in the above bargaining unit in that the Company refused to recognize the Union as representative of the above employees until an election had been conducted by the Board, and that "said question concerning representation is a question affecting commerce within the meaning of said Act." (Item 10 (sic); R. 11.)

There was no allegation whatsoever in the Board's application (or even that the Board believed, or had reasonable cause to believe) that Petitioner Bank was engaged in

commerce, or that its activities affected commerce, or that the question concerning representation affected commerce. (R. 2-20.) The allegations were that the evidence sought was relevant, material and necessary in that they bore upon whether or not the operations of the Petitioner Bank affected commerce. (R. 6-7.)

Petitioners filed their joint and several answer and amendment thereto, and prayed that the rule to show cause theretofore entered be discharged for the reasons set forth in their said answer. (R. 21, 47.)

Petitioners admitted the service of the subpoenas and alleged that Petitioners were not required to obey the same because no question affecting commerce had arisen concerning the representation of employees of Petitioner, The Northern Trust Company, within the meaning of Section 9(c) of the National Labor Relations Act, nor had the Board, in and by its application, shown or offered to show that any such question had arisen. (R. 21-24.)

By an amendment to their answer Petitioners further showed that substantially all of the information sought to be obtained by the production of said books, lists, reports, documents, statements and other records appeared in the published statement of Petitioner, The Northern Trust Company, as of December 31, 1943, a copy of which statement had been delivered to the Board and introduced in evidence by the Examiner at the hearing; that said reports, documents and records had no bearing upon the issue whether any question affecting commerce had arisen concerning the representation of employees of the bank, nor were they necessary for the determination of the question as to whether Petitioner, The Northern Trust Company, was engaged in interstate commerce or affected such commerce. (R. 47-48.)

Petitioners further filed in the District Court an affidavit of Arlen J. Wilson, a Vice President of Petitioner, The

Northern Trust Company, to the effect that said Petitioner was a state bank conducting a general banking business in its bank building at 50 South La Salle Street, Chicago, Illinois, its only place of business, and that it had no other business; that all of its employees worked in said bank building, including said thirteen uniformed policemen who acted as armed guards and had no other occupation with said bank and did no work outside of said banking premises. (R. 50-53.)

At the hearing before Judge Holly, Respondent introduced no evidence of any kind to show that Petitioner Bank or its said employees were engaged in interstate commerce or in any activities affecting interstate commerce or that any question concerning the representation of employees of Petitioner Bank affected commerce. On the contrary, Respondent Board at the hearing stated specifically that it did not know whether Petitioner Bank was engaged in interstate commerce or in any way affected commerce. The Board merely asserted, in line with the allegations in its application, that it desired the evidence sought by the subpoenas to find out whether a question affecting commerce had arisen concerning the representation of employees of said Petitioner Bank or whether Petitioner Bank was in commerce, or whether any of its activities affected commerce.

The District Court filed a memorandum opinion stating as one of the questions to be decided: "May the Board in the absence of any showing that the Bank or its employees are engaged in any activities affecting interstate commerce, require the Bank to produce its records for the inspection of the Board in an investigation carried on by it under the provisions of Section 9(c) of the National Labor Relations Act or may its officers be compelled to testify in such an investigation." (R. 56.) The District Court thereupon stated it as its opinion that the Board was

"entitled to an order compelling obedience to the subpoena without first showing that the Bank is engaged in interstate commerce or that its activities affect that commerce." (R. 59.)

Thereupon the District Court entered its order directing compliance with said subpoenas (R. 61) with certain modifications as to the time and place of producing the books and records and the number of such books and records to be produced at any one time. (R. 62.)

Petitioners thereupon appealed to the court below from the order of enforcement (R. 64) and the Board cross appealed from the qualification which the District Court attached to the order of enforcement. (R. 69-70.) The order of the District Court was in all respects affirmed. (R. 90-91.)

## Questions Presented.

1. Whether the trial court had the right and must, upon the present application, determine the question as to whether the Petitioner Bank is in commerce or affects commerce within the meaning of the National Labor Relations Act and specifically within the meaning of the commerce clause of the Federal Constitution.

2. Whether a state bank, as such, is necessarily engaged in commerce within the meaning of the National Labor Relations Act or the commerce clause of the Federal Constitution or necessarily affects such commerce.

3. Whether, if the National Labor Relations Act, as a matter of construction, precludes the District Court on an application for enforcement of the Board's subpoenas, in connection with an investigation under 9(c), from inquiring into the question of coverage, and to that extent into the question of the Board's jurisdiction, the Act to such an extent is constitutional?

4. Whether state banks are subject to federal control beyond the right to regulate the public finance.

5. Whether the subpoena duces tecum herein involved is too broad and whether it amounts to an unreasonable search and seizure.

**Reasons for Granting the Writ.**

1. The basic question presented by the instant case has never been passed upon by this Court. The question is of such importance as to both justify and require a review by this Court of the holdings of the two courts below. An Illinois bank has been subjected to the compulsory process of the District Court in the enforcement of subpoenas issued by the respondent Board in a proceeding under Section 9(c) of the Act without any determination by the District Court of whether such bank is engaged in commerce or whether its activities affect commerce or whether it is subject to the Act at all or whether the Board has any jurisdiction at all. The order of the District Court went upon the bare statement by the Board that it does not know whether Petitioner Bank is or is not engaged in Interstate Commerce, or whether its activities do or do not affect commerce. Nothing in the Act with respect to a proceeding under Section 9 (c) takes away from the District Court its inherent jurisdiction to determine any question which is properly presented by the pleadings, nor is there any such provision applicable to a Section 9 (c) proceeding as is found in Section 10 (a) with respect to an unfair labor practice proceeding whereby the Board is given initial exclusive jurisdiction to determine all questions subject to review by the appropriate Circuit Court of Appeals. The court below misconceives the statute when it says (R. 84) that the "yardstick is the same under Sec. 9(c)", and, further (R. 84), that no good reason appears

why the Board "should not make the initial determination" of the existence of a question affecting commerce in a proceeding under Section 9(c). The question is not as to whether the Board may make such a determination initially where no objection is interposed thereto, but it is whether, over objection, the Board under Section 9(c) is given *exclusive* jurisdiction to determine the question.

This is not a case where petitioners are attempting by an independent suit instituted by themselves to review a mere certification by the Board and, therefore, the question mooted in the *American Federation* case[1] and in the recent *Inland Empire* case[2] is not the question presented by the instant case.

The Board's jurisdiction to proceed at all depends upon the fact that the petitioner bank is engaged in commerce or its activities affect commerce or that a question affecting commerce has arisen concerning the representation of employees. At the same time the Board denies the power and duty of the District Court to determine the jurisdictional question, even though the Board itself has invoked the aid of the District Court in aid of its own asserted jurisdiction. The court below states (R. 84) that to give the District Court such power would "require the Board to come into the District Court and affirmatively prove that a question affecting interstate commerce had arisen before it (the Board) had had a chance to investigate whether the question actually exists." It is said that to the court's way of thinking "that would be putting the cart before the horse". (R. 84.) In other words, although the Board's jurisdiction depends upon the existence of a question affecting commerce, the court below leaves it to the Board exclusively to determine that question with no available method of court review so far as any question of compelling compliance with the subpoenas is concerned.

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1. *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401.

2. *Inland Empire, etc., et al.* v. *Millis, et al.*, .... U. S. .... No. 613 Oct. Term, 1944, decided June 11, 1945.

Congress, of course, did not intend to grant exclusive power to the Board to determine its own jurisdiction in such a case. No such power may be vested by the Congress in any administrative body. (*Crowell* v. *Benson*, 285 U. S. 22.) There being no provision for review of the question under section 9(c), it necessarily follows that the District Court not only had the power, but was required, to determine whether the Board had jurisdiction to issue the subpoena.

That the Court utterly confuses Section 9(c) and Section 10 is apparent when it says (R. 84):

> "The *Myers* and *Newport* cases make it plain that the initial determination of jurisdiction by the Board may not be enjoined, and obviously this prohibition would become meaningless if judicial examination of the same question were permitted in a subpoena enforcement action."

The court below even goes to the extent of saying that to take away from the Board in a Section 9(c) proceeding the *exclusive* right to make the initial determination would "violate the will of Congress as expressed in the statute." There is, of course, no such expression in the statute, and, as a matter of ordinary construction, the omission of any provision in Section 9(c) giving the Board exclusive initial jurisdiction as in Section 10(a) is a plain expression that the Congress intended no such limitation upon the ordinary function and duty of the District Court when its jurisdiction is duly invoked.

Apparently these considerations compelled the court below to justify its conclusion by either reading into Section 9 (c) a provision equivalent to that found in Section 10 (a), or to eliminate from Section 10 (a) the provision for exclusive jurisdiction in the Board as being wholly immaterial. (R. 83-84.)

2. There is a conflict between the circuits as to the extent to which the District Court, in a proceeding for the

enforcement of an administrative subpoena, is required to inquire into the question of coverage. The question arises under a variety of statutes. (R. 84.) It happens that the most prolific source of cases involving this question is the Wage and Hour Statute. There the lower Federal courts are not in complete accord. The Sixth Circuit—*General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d, 596, holds that there must be a determination under the Wage and Hour Act as to whether the industry sought to be investigated is covered by the Act. We do not regard such decision as essentially limited by the more recent decision of that court in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198, where the only question was as to whether certain employees were exempt from the Act as seamen. Divergence of view also appears in *Walling* v. *News Printing Co.* in the Third Circuit, 148 F. 2d 57, in which case certiorari has recently been granted by this court—No. 1179, October Term, 1944. Similarly in *Walling* v. *Oklahoma Press Publishing Co.*, 147 F. 2d 658, the Tenth Circuit held that there need be no adjudication of actual coverage but that the District Court should be assured that there are reasonable grounds for making the investigation and that an allegation in the Administrator's application that he was informed and believed that the concern was subject to the Act constituted reasonable grounds. Certiorari was also granted in this last case in No. 1171, October Term, 1944.

We assume that the granting of certiorari in these two cases was intended to enable this court to clarify the question thus presented. Obviously the Wage and Hour cases are not in and of themselves controlling inasmuch as there is marked dissimilarity between the Wage and Hour Act and the National Labor Relations Act, and it seems to us that there is, or may be, a wider range of administrative action under the Wage and Hour Act than under the National Labor Relations Act. Nevertheless if this Court

ultimately holds that under the Wage and Hour Act the District Court in a proceeding to enforce administrative subpoenas has the duty of inquiring into the matter of coverage, or must require the Administrator to make a showing of coverage, then it could hardly be held that in a proceeding under Section 9(c) of the National Labor Relations Act the District Court has no duty to inquire into the question as to whether a question affecting commerce has arisen. The conflict is such as to require the granting of the writ in the instant case even though the conflict arises under different statutes. In this connection it is to be noted that in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, involving the Walsh Healy Act, certiorari was granted not only because of the importance of the questions in the enforcement of that Act, but because of probable conflict with the decision of the Sixth Circuit in the *Tobacco* case. (The Wage and Hour Act.) The decision in the *Endicott Johnson* case left uncertain the continued status of the decision in the *Tobacco* case and the views of the lower Federal courts on that point are not in agreement. For that reason, and whatever this Court may ultimately decide in the Wage and Hour cases, the difference in the two statutes requires, we respectfully submit, that this Court pass upon the question in the instant case and to determine to what extent the District Court is required to, or may, inquire into the question as to whether Petitioner Bank is engaged in commerce or whether its activities affect commerce—particularly where such question involves a local state bank over which there is no right of Federal control.

3. The court should also take this case for the purpose of clarifying its decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501. That case was decided under the Walsh-Healy Act and obviously depended upon the particular provisions of that Act. Nevertheless the case has become a fetish for many of the lower courts and has been

accepted in varying degree as controlling authority in the enforcement of all administrative subpoenas without any inquiry or determination of coverage wholly without regard to the statute involved. This situation was called to the attention of this court in the petitions for certiorari in the two newspaper cases above mentioned. In the instant case the court below said that petitioners had "made a valiant effort to distinguish *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, but while they have pointed out certain factual differences they have failed to demonstrate the inapplicability of the principles therein enunciated". (R. 84.) We can only understand this statement to mean that the court regards the *Endicott Johnson* case as controlling in an enforcement proceeding under the National Labor Relations Act, notwithstanding the wide difference in the statutes involved.

If Petitioners' position is correct that the Board has no exclusive power to determine its own jurisdiction in a proceeding under section 9(c), then the decision in the *Endicott Johnson* case could not apply. That was a question of primary jurisdiction before review by the courts of the action taken by the Secretary of Labor. Here, as shown, the jurisdiction of the District Court was invoked by the Board and there is no provision for review by any court. The *Endicott Johnson* case, by virtue of the generality of the language used, has and will continue to confuse the lower Federal courts unless this Court defines the scope of its application.

4. As indicated above, an important question of Constitutional law also arises under the National Labor Relations Act if, as a matter of construction, the District Court, in an enforcement proceeding with respect to Section 9(c), is precluded from inquiring into the question of coverage—specifically as to whether the Petitioner Bank is engaged in commerce, or whether

its activities affect commerce. In an unfair labor practice proceeding under Section 10, this Court saved the Constitutionality of the Act only by recognizing the right of judicial review by the Court of Appeals under the express provisions of Section 10. Except for such review the statute would have left to the Board the exclusive and final determination of the question of its own jurisdiction. But in a proceeding under Section 9(c) there may never be a proceeding under Section 10, and therefore when the jurisdiction of the District Court is invoked by the Board to enforce its subpoenas in a proceeding under said section if the District Court is not to be permitted to inquire into the question of coverage then obviously the Board is put in the position of exclusively and finally determining its own jurisdiction so far as the compulsory production of evidence is concerned. What then saves the Constitutionality of the Act if no court review is provided to determine coverage? The question is particularly acute in the instant case for the reason that an Illinois bank is involved. This Court has never decided this particular question, and it is important that if the statute is to be construed as the court below has construed it, this Court determine the Constitutional validity of the Act.

5. The court should also decide as to whether a state bank, under the circumstances presented by the instant record, may be subjected to the regulatory power of the Federal Government as expressed in the National Labor Relations Act. Petitioners submit that this question is not in any way foreclosed by the decisions involving national banks where the National Labor Relations Act has been held applicable. To subject a local state bank to the provisions of the National Labor Relations Act as concerns its protective force, here only 13 policemen, is a far cry from the assertion of authority under the National Labor Relations Act in the national bank cases above re-

ferred to. It is important that this court determine with certainty the line of demarcation in the control of the Federal Government over state banks as to matters other than those of the public finance.

6. The court should also determine whether in such a case the subpoena here involved amounts to an unreasonable search and seizure. As pointed out above, there is no allegation in the Board's application that the petitioner bank is engaged in commerce or that its activities affect commerce. The Board contents itself by the mere statement that it wants certain evidence to find out whether or not Petitioner Bank is so engaged. The character of the documentary evidence called for on its face proves nothing as to whether Petitioner Bank is or is not engaged in commerce or whether its activities affect commerce. We refer the court particularly to the discussion of this question under Point V of the supporting brief.

We submit that the enforcement of the subpoena in the instant case is in probable conflict with applicable decisions of this court with respect to the subpoena power of administrative agencies.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the seventh circuit to the end that this cause may be reviewed and determined by this Court; that the order and judgment of the said Court of Appeals be reversed by this Court and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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